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Position paper by Palestinian human rights organisations:

The Law by Decree Amending the Law on the Judicial Authority and the Law by Decree on the Formation of a Transitional High Judicial Council

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The undersigned Palestinian human rights organisations view with deep concern the current status of, and patterns of interference with, the Palestinian judiciary and justice sector. The human rights organisations are further greatly concerned as to the violation of firmly established constitutional principles as enshrined under the Amended Basic Law. On 15 July 2019, the Palestinian President promulgated Law by Decree No. 16 of 2019 Amending the Law on the Judicial Authority and Law by Decree No. 17 of 2019 on the Formation of a Transitional High Judicial Council. Published in the Official Gazette, both recently adopted laws by decree reflect a dangerous shift undermining constitutional legitimacy, particularly the principles of the rule of law, the separation of powers, the foundations of judicial independence, and pillars of good governance. As a result, such a shift may strip fundamental rights and freedoms of their judicial protection, which require an independent judiciary, whose formation and functions are solely governed by law and the principle of legality.

Modern constitutional jurisprudence and legislation tends to view the independence of the judiciary as a key prerequisite for democratic constitutions. Providing a protective shield for public rights and freedoms and the principle of the rule of law, the judiciary is accorded the same status as the executive and legislative branches of Government. Accordingly, constitutions and laws must incorporate norms guaranteeing the requirements of judicial independence by laying the foundations for specific constitutional and legal regulations ensuring the protection of the independence of the judiciary both procedurally, in terms of its formation, and objectively in terms of its functioning. These matters are addressed under Articles 97, 98, 99, and 100 of the Palestinian Basic Law, which serves as the provisional Constitution.

Under the principle of the supremacy of the constitution, ordinary legislation must comply with, and may not violate, the object and purpose of constitutional laws. As such, the ordinary legislature, meaning the legislative power, must maintain the highest degree of vigilance in the law-making process. This principle is all the more relevant in the case of extraordinary legislation, namely laws by decree, which are promulgated while the Palestinian Legislative Council, the Parliament, is not in session and in cases of necessity,

¹ Al-Haq, “The Law by Decree Amending the Law on the Judicial Authority and the Law by Decree on the Formation of a Transitional High Judicial Council” [Arabic] (24 July 2019), available at: http://www.alhaq.org/arabic/index.php?option=com_content&view=article&id=1004:qq-&catid=95:2015-05-09-08-24-39&Itemid=235.

which cannot be delayed. Notably, laws by decree have the same power of law as ordinary legislation but are not considered laws as such. Rather, they constitute executive decrees that have the force of law. When it comes to the judiciary, there is a need for even greater vigilance, the Palestinian Basic Law regarding the judicial power as a constitutional matter, for which it has devoted a special and markedly different regulation compared with other matters.

The amendment to the Law on the Judicial Authority comes in light of the current crisis and the unprecedented conflict and polarisation within the Palestinian political system, with their serious implications on the enjoyment of human rights and fundamental freedoms in Palestine. The amendment also comes within the context of the continued deterioration in the human rights situation and the failure by the State of Palestine to abide by its international obligations following its accession to core human rights treaties, and in particular, the 1966 International Covenant on Civil and Political Rights (ICCPR), which obliges States Parties to ensure the independence and impartiality of the judiciary. In addition, the recently adopted laws by decree on the judiciary are contrary to the 1985 United Nations (UN) Basic Principles on the Independence of the Judiciary, which reaffirm that judicial independence shall be guaranteed by the State, while they further violate the object of national constitutional principles guaranteeing judicial independence.

Having followed closely the amendment by the executive authority of the Law on the Judicial Authority, its dissolution of the High Judicial Council as well as all panels of the High Court and of the courts of appeals, and the formation of a Transitional High Judicial Council with broad and open-ended powers without legal safeguards or standards, the Palestinian human rights organisations here undersigned stress the following:

1. The amendment of the Law on the Judicial Authority is one of the constitutional matters for which a special regulation has been devoted by the constitutional legislator, in addition to different procedures from those applicable to ordinary laws. In fact, according to Article 100 of the Amended Basic Law, the amending authority must consult with the High Judicial Council with regard to draft laws relating to any matter concerning the judicial authority, including the Public Prosecution. However, this procedure was not followed in the promulgation of the recently adopted laws by decree on the judiciary, as reflected in both their preambles, which state that they are based on the recommendations of the National Justice Sector Development Committee, headed by the Chairman of the High Judicial Council, and as established by the executive authority. Accordingly, these laws by decree were not adopted following consultation with the High Judicial Council, as mandated by the abovementioned constitutional provision.
2. In Article 2(3), Law by Decree No. 17 of 2019 vests the Transitional High Judicial Council with broad powers, including the power to dismiss any judge upon a recommendation to the President. This amounts to a grave violation of the principle of the irremovability of judges in cases other than those prescribed by the law, as guaranteed under Article 99(2) of the Basic Law and Article 27 of the Law on the Judicial Authority. The principle of the irremovability of judges constitutes a key judicial guarantee for the protection of fundamental rights and

- freedoms in addition to the rule of law. Additionally, once the Transitional High Judicial Council is in place, the power of removal jeopardises the continued exercise by judges of judicial office and undermines the solemn status of, and public confidence in, the judiciary, while it foreshadows an increase in authoritarian control, which is inconsistent with the principles of justice, integrity, and the role of the judiciary, for lacking in relevant safeguards.
3. Based on the broad sense and powers it provides, Law by Decree No. 17 of 2019 tasks the Transitional High Judicial Council with reforming and developing the judicial authority and the Public Prosecution, which extends, under Article 2(4), to developing draft legislation amending the Law on the Judicial Authority No. 1 of 2002 as amended and the Law on the Formation of Regular Courts No. 5 of 2001 as amended, in addition to any other set of laws relating to the judiciary. This power undermines the principle of popular sovereignty, in the sense that it seizes the role of Parliament – the representative of popular will – in enacting laws and regulations governing all societal matters, including society’s interest and right to an independent and fair judiciary, whereas reform should not involve a violation of the Basic Law.
 4. The Law on the Judicial Authority No. 1 of 2002 provided, in Article 81, that the President of the Palestinian Authority has the power, upon a recommendation by the Minister of Justice, to issue a decision on the formation of a Transitional High Judicial Council, only once, and within a maximum period of one year. This power was exercised by the President through Presidential Decree No. 11 of 2002. In addition, the formation of the High Judicial Council succeeding the Transitional Council must be subject to the Law on the Judicial Authority, and in particular, to the conditions of Article 37 thereof. As such, Law by Decree No. 17 of 2019, which stipulates the formation of a new Transitional High Judicial Council, violates the provisions of the Law on the Judicial Authority, while it is incompatible with the intention by the constitutional and ordinary legislators to grant the executive authority the power to intervene, only once, in the formation of the High Judicial Council and for the purpose of the initial establishment of a Transitional High Judicial Council, in order to prevent the executive from interfering in the affairs of the judiciary.
 5. The Law on the Judicial Authority No. 1 of 2002 establishes a Judicial Inspection Department in accordance with Part II of Chapter Four and governs disciplinary accountability of judges, under Part IV of the same section. Recourse may be had to these provisions to hold judges to account for misconduct, while at the same time maintaining their right to defend themselves. As such, reform can take place without encroaching upon the rule of law. This explains why the judicial crisis is not a crisis of law, but instead arises from violations of the rule of law and the erosion of constitutional principles and values, the requirements of integrity and transparency, and the tenets of good governance.
 6. Combined with the dissolution of the legislature, the ongoing deterioration in the judiciary and the executive is the result of the continued Palestinian political

divide and its associated implications and the failure to comply with the provisions of the Law on the Judicial Authority. Rather than stemming from the Law on the Judicial Authority, the continued deterioration is also the result of attempts by the executive authority to seek domination over the judiciary and the justice sector as well as repeated violations, by the executive power itself, of the Palestinian Basic Law and constitutional norms.

Against this backdrop, the Palestinian human rights organisations here undersigned, based on their role and determination to promote respect for the principle of the rule of law, for public rights and freedoms, for the principle of the separation of powers, and for judicial independence, call for:

1. The repeal of Law by Decree No. 16 of 2019 Amending the Law on the Judicial Authority and Law by Decree No. 17 of 2019 on the Formation of a Transitional High Judicial Council, both of which violate the provisions of the Basic Law, the principles of the rule of law, the separation of powers, and judicial independence, and Palestine's international obligations, in particular those enshrined under the ICCPR and the UN Basic Principles on the Independence of the Judiciary;
2. Compliance with the Law on the Judicial Authority and the principles of the rule of law and separation of powers in the relationship between the executive and the judiciary, an end to acts of interference by the executive authority and its agencies in judicial matters and the punishment thereof, the activation of the Judicial Inspection Department and the norms governing the disciplinary accountability of judges in carrying out any procedures aimed at addressing the misconduct of judges, while ensuring their right to defend themselves, as enshrined in the Law on the Judicial Authority No. 1 of 2002, and the provision of adequate resources to the judiciary to ensure that it can properly discharge its functions;
3. Giving priority to, and exerting all efforts, to put an end to the Palestinian political divide on the basis of a transitional justice programme, which addresses all damages resulting from the division, and working seriously towards rebuilding the Palestinian political system on democratic foundations based on constitutional principles and values, and in line with Palestine's international obligations;
4. The issuing of a presidential decree setting a date to hold presidential and legislative elections in all Palestinian Governorates, including Jerusalem, in pursuance of Article 26 of the Basic Law on the right to participate in political life;
5. Restructuring the judicial authority in the southern Governorates in compliance with the provisions of the Law on the Judicial Authority and uniting it with the judicial authority in the northern Governorates, including in safeguarding its independence, and revoking the Presidential Decision forming the Supreme Constitutional Court, for violating the law on the Court's formation;
6. An elected Palestinian Legislative Council to review all pieces of legislation, including laws by decrees enacted during the Palestinian political divide, for the




purposes of approval, amendment or repeal, while preserving the legal rights established and consistent with the provisions of the law, and finalising the legislative consolidation process initiated by the first Palestinian Legislative Council in 1996;

7. An elected Palestinian Legislative Council to introduce legislative amendments protecting the structure and unity of the political system, while avoiding a relapse into a similar power struggle such as that of mid-2007; and
8. Ensuring that the amendments made include constitutional safeguards against overlapping powers between public authorities and the domination of one power over the other, to include a balance and integration of their functions, and to implement the international treaties to which Palestine has acceded within the Palestinian legal system, and to adopt all necessary policies and decisions to enforce these measures by all public authorities, institutions, and agencies.

– ENDS –

Signatories to the position paper:

- **Addameer Prisoner Support and Human Rights Association**
- **Al Mezan Center for Human Rights**
- **Al-Dameer Association for Human Rights**
- **Al-Haq – Law in the Service of Man**
- **BADIL Resource Center for Palestinian Residency and Refugee Rights**
- **Defense for Children International – Palestine**
- **The Palestinian Centre for Human Rights (PCHR)**

Al-Haq	Al Mezan Center for Human Rights
	
Palestinian Centre for Human Rights	Addameer Prisoner Support and Human Rights Association
	

Al-Dameer Association for Human Rights



BADIL Resource Center for Palestinian Residency and Refugee Rights



Defence for Children International – Palestine Section

